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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MGM GRAND AIR, INC.,
Petitioner,

vs.

MARK MICELI, ANDREA MICELI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

1. MICELI IMPROPERLY CONFUSES THE ISSUE OF DELIVERY WITH THE ISSUE OF WHAT CONSTITUTES A TICKET UNDER THE WARSAW CONVENTION

In his Opposition, MICELI argues that no ticket was delivered to him and therefore the question whether or not the Charter Agreement is or is not a "ticket" within the meaning of the Warsaw Convention is 'moot.' Opposition p. 11 et seq. MICELI also argues that the California Court of Appeal does not conflict with this Court's decision in *Chan v. Korean Airlines,* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 because this Court stated that delivery of a ticket was required.

What MICELI seeks to do is confuse two entirely separate issues. They are:

1. Does the Charter Agreement meet the requirements of Article 3 of the Warsaw Convention?
2. Was there sufficient delivery?

In the petition for certiorari, MGM focuses on the first issue, was there a "ticket," because that is the only issue which the California Court of Appeals purported to decide. The second issue of "delivery" is discussed in the petition only to the extent required because the California Court of Appeal, like MICELI, declined to distinguish between the two issues. In doing so, MICELI seeks to reverse the decision in *Chan, supra* and take the law back to the notion that the Warsaw Convention requires some

sort of actual or "adequate" notice of its application.

For instance, at page 8 of the Opposition, MICELI states that "the objectives of the Warsaw Convention were to (1) secure uniformity in documentary practices; (2) limit airline liability for international flights and (3) **afford adequate notice of such limitations to passengers** and shippers" and cites *Block v. Compagnie Nationale Air France* (5th Cir. 1967) 386 F.2d 323 in support of that statement. MICELI then baldly asserts that this Court's decision in *Chan, supra*, "does not disagree with these objectives."

> MICELI apparently misunderstands *Chan*. "For the reasons given above, we agree with the opinion of the Supreme Court of Canada, see *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (1979), **that the Warsaw Convention does not eliminate the limitation on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation.** Accordingly, we affirm the judgment of the District of Columbia Circuit." *Chan, supra* at p. 135 (emphasis added)

2. THE CHARTER AGREEMENT COMPLIES WITH THE REQUIREMENTS FOR A TICKET

The Warsaw Convention's aim of "uniformity" in travel documentation does not require that every airline's documents must be exactly like every other airline's documents. The Warsaw Convention only seeks uniformity to the extent that all "tickets" should contain certain specific information. It goes no further. The

Warsaw Convention does not define the term "ticket" but does state that the travel document referred to as a "ticket" must be a document which contains:

> "(a) The place and date of issue;
> "(b) The place of departure and destination;
> "(c) The agreed stopping places . . .;
> "(d) The name and address of the carrier or carriers;
> "(e) A statement that the transportation is subject to the rules relating to liability established by this convention." Warsaw Convention Article 3(1).

The charter agreement contains all of the information required of a ticket under the Warsaw Convention./[1] In deciding *Chan*, *supra,* this Court discussed what documentation would qualify as a "passenger ticket" and was quite clear in its statement.

> "Thus, a delivered document does not fail to qualify as a 'passenger ticket,' and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. When Article 3(2), after making this much clear, continues (in the

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1. MICELI seeks to add an additional requirement, that the "ticket" must be issued to an individual passenger and argues that in all of the reported cases involving charter flights, individual passenger tickets were delivered to the passengers. MICELI then asserts that the charter contract cannot be a ticket. The argument begs the question. In none of the cases cited by MICELI was there an issue of what constitutes a "ticket" and they are therefore not precedent for this case. It further points out the need for this Court to intervene since the question of what constitutes a ticket is misconstrued in the reported opinion of the California Court of Appeal.

> second sentence) 'Nevertheless, if a carrier accepts a passenger without a passenger ticket having been delivered, etc.' it can only be referring to the carrier's failure to deliver any document whatever, or its delivery of a document whose shortcomings are so extensive that it cannot reasonably be described as a 'ticket' (for example, a mistakenly delivered blank form, with no data filled in). Quite obviously, the use of 8-point type instead of 10-point type for the liability limitation is not a shortcoming of such magnitude; indeed one might well select that as a polar example of what could not possibly prevent a document from being a ticket." *Chan, supra* at pp. 128 - 129.

The Charter Agreement is not a blank form with no information filled in. In fact, it sets forth the required information in full 12-point type. The place and date of issue, August 27, 1993, Manhattan Beach, California (Appx. I-1); The place of departure and destination (Appx. I-29); The agreed stopping places . . . (Appx. I-29); The name and address of the carrier or carriers (Appx. I-1, I-21) and; A statement that the transportation is subject to the rules relating to liability established by the Warsaw Convention is set forth in a full paragraph in 12-point type under the heading "LIABILITY OF MGM GRAND AIR." (Appx. I-17 to 18).

The Charter Agreement fully complies with all of the requirements *which the Warsaw Convention* imposes. Despite the clear language from *Chan, supra*, the California Court of Appeals stated:

> "We further hold that the charter agreement is not a 'passenger ticket' for all who board an aircraft under the Warsaw Convention. In this particular situation MGM 'accept[ed] a passenger without a passenger ticket having been delivered.' Since MGM did not adhere to the provisions of the Convention by issuing *individual* 'passenger tickets,' it is thereby 'not entitled to avail [itself] of those provisions of the Convention which limit its liability.'" *Miceli v. MGM Grand Air,* 51 Cal.App.4th 702 (1996) Appx. C-10, emphasis added.

Clearly the Court of Appeals has misconstrued or ignored this Court's decision in *Chan*. Further, contrary to MICELI's argument in his opposition to the petition for *certiorari,* the opinion of the California Court of Appeal does conflict with this Court's decision since the charter agreement would qualify as a passenger ticket under *Chan* but is held not to so qualify under *Miceli v. MGM Grand Air.* [2]

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2. This Court should also consider that the California Court of Appeal and MICELI contend that a "ticket" is the item that is surrendered to the airline immediately before boarding. However, the document surrendered at the boarding gate is actually a flight coupon which is but one item in the documentation generally in use in the United States. The flight coupon itself ordinarily does not have all of the information required by the Warsaw Convention. The Warsaw notice is ordinarily contained in the jacket and cover sections of the packet in which the flight coupons are enclosed. Thus, the "ticket" is in fact the entire package consisting of the jacket, cover, notices, flight coupons and itinerary and the "ticket" is not surrendered. Only the flight coupon is surrendered. Thus, it is clear that the issue boils down to whether or

3. THERE WAS SUFFICIENT DELIVERY UNDER THE WARSAW CONVENTION

MICELI argues that, irrespective of this Court's decision whether or not the Charter Agreement has the required information under the Warsaw Convention, the question is moot since the document was not "delivered" to MICELI. In support of this argument, MICELI asserts that there was no relationship between himself and the charterer. This cannot be the case. The charterer, Music Guide, Inc. arranged transportation for the "Girly Show" Tour participants, including MICELI. He cannot expect any court to take seriously his claim that there existed "no relationship" between himself and the charterer. To accept such a claim would be to determine that MICELI found himself on the aircraft, traveling about the planet with Madonna by mere happenstance.

Further, even the cases cited repeatedly and devotedly by MICELI, especially *Block v. Compagnie Nationale Air France*, (5th Cir. 1967) 386 F.2d 323, make it clear that a substantial relationship exists between the charterer (Music Guide) and the passengers. It was part of the rationale of the *Block* court that "there is no Warsaw objection therefore to a third person *acting as the agent of passengers* or entering into a contract with the carrier for the benefit of the passengers ('*stipulation pour autrui*). *Block, supra* at p. 332. MICELI has quoted carefully edited portions the following language from *Block* at every stage of the proceedings herein:

---

not the Warsaw Convention requires a "ticket" to have a particular format, with flight coupons, or not.

> "The fatal flight developed out of three sets of contractual relationships: first the relationship between Air France and the Atlanta Art Association, created by their 'International Charter Flight Agreement'; **second, the more informal set of relationships between the Art Association and the individual passengers**; and third, the relationships between the individual passengers and Air France, concluded by the airline's delivery to each passenger of a personal ticket for the flight." *Block, supra* at p. 336.

Clearly, there is in fact and in law a relationship between the passenger, MICELI and the charterer Music Guide whether Mr. MICELI chooses to recognize it or not. This relationship is of significance to the question of delivery. In the only reported case directly on point, it was held that delivery of the ticket to the person who made the travel arrangements for the passenger was sufficient delivery, whether or not the passenger ever took possession of the ticket or ever read the language related to the applicability of the Warsaw Convention. In *Ross v. Pan American World Airways* (1949) 299 N.Y. 88, 85 N.E.2d 880, the Court noted that the liability limitation would be of a benefit to passengers as tending to lessen litigation and would benefit carriers by providing a more definite basis on which to obtain insurance and would lower operating expenses which in turn would inure to the benefit of passengers by way of lower rates.

> "Those aims would be poorly served by any holding that the limitation of liability is available only when a carrier can produce affirmative proof not only that the

> passenger ticket complied with the Convention, but that the individual who bought the ticket at the carrier's ticket counter, was the passenger himself or someone specifically authorized by the passenger to consent, on the latter's behalf to limited liability.
>
> "Coming back to the undisputed facts of the case we have before us, let us remember that, as to defendant, this was a routine sale, in the ordinary course of its common carrier business, of a ticket which nominated appellant as the intending passenger. If there was here any failure to adequately inform appellant of her subjection to the Warsaw Convention, that failure was not the defendant's - and yet, if we were to hold that there was, somehow, lack of appropriate 'delivery' here, Defendant would be the loser. Putting it another way: it was no concern of the carrier as to what the arrangements were between the passenger and the person who took delivery of the ticket." *Ross, supra* at pp. 97-98.

Further, as noted in the *Block* case, the charterer, Music Guide, was acting as the agent for the passengers, including MICELI, in arranging the travel. An agent is someone who acts on behalf of someone else in dealings with a third party. *California Civil Code* § 2295. Agreements reached between an agent and a third party are binding on the principal. *California Civil Code* § 2330. An agency is created either prospectively by agreement between principal and agent or may be created

retroactively when the principal ratifies the acts of the agent. *California Civil Code* § 2307. Retroactive agency is established by the acts of the principal in accepting or retaining the benefits of the transaction arranged by the agent. *Vanciel v. Kumle*, (1945) 26 Cal.2d 732, 160 P.2d 802.

Clearly, Music Guide was acting as the agent of MICELI and all of the tour participants when it negotiated the charter. Delivery of the charter agreement to the agent, Music Guide, was constructive and sufficient delivery to the principal, MICELI. Certainly, the agency relationship was created by ratification when MICELI boarded the aircraft in Montreal and thereby took the benefits of the arrangement made on his behalf by Music Guide.

In short, while delivery was purportedly not decided by the California Court of Appeal, there is certainly an issue as to the sufficiency of the delivery. While MICELI contends in his brief that the question of what constitutes a ticket is moot because there was no delivery of any document, he ignores legal precedent and general agency laws in making that assertion. There was sufficient delivery.

4. CONCLUSION

In his opposition, MICELI confuses the question of what constitutes a ticket under the Warsaw Convention with what is required for delivery. Since the California Court of Appeals decision purports to decide only what constitutes a ticket, the matter of delivery is irrelevant.

MICELI incorrectly argues that the decision of the California Court of Appeal does not conflict with this Court's decision in *Chan v. Korean Airlines,* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113. Clearly the charter agreement would qualify as a passenger ticket

under the *Chan* case. Yet, MICELI argues, and the California Court of Appeals agreed, that a ticket must be a document which one surrenders to the carrier before boarding the aircraft. A ticket has a particular format and is issued to a specific individual under the decision of the lower court even though the Warsaw Convention has no requirement that the ticket be issued to a specific person, no requirement that the passenger's name even be part of the ticket and no requirement that the ticket have a particular format. All such requirements are implied by the lower court's decision.

Finally, although MICELI argues that there was no delivery to him, such personal delivery is not required by the Warsaw Convention. Constructive delivery such as occurred here should be sufficient. If actual delivery is a requirement of the Warsaw Convention, the method of ticket sales in the nation must be radically changed. The carrier would have to ensure that the passenger himself was handed the ticket and travel agencies will be a thing of the past.

Therefore, MGM GRAND AIR, INC. respectfully requests that this Court issue a writ of certiorari to the California Court of Appeal to review its decision and opinion in this action.

Respectfully submitted,

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